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Nos. 752 and 887

In the Supreme Court of the United States

OCTOBER TERM, 1964

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION

NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC., PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. No. 752, pp. 19–43; Pet. No. 837, pp. 1a–25a) is reported at 337 F. 2d 289. The opinion of the Federal Maritime

Commission (Pet. No. 752, pp. 46–53; Pet. No. 837, pp. 1d–8d) is reported at 2 S.R.R. 735.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1964, and rehearing was denied *en banc* on November 12, 1964 (Pet. No. 837, pp. 1b–2b, 1c–2c). The petitions for writs of certiorari were filed on December 11, 1964 (No. 752), and January 15, 1965 (No. 837), respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether rules promulgated by the Federal Maritime Commission regulating freight forwarders were within the rulemaking authority of the Federal Maritime Commission.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Shipping Act of 1916, as amended by the Freight Forwarder Law of 1961, 75 Stat. 522, 46 U.S.C. 801, *et seq.*, and the Federal Maritime Commission's General Order 4, Amendment 1, Subpart B, are set out in the petition in No. 752, pp. 54–64.

STATEMENT

Petitioners challenge certain rules issued by the Federal Maritime Commission to implement the national maritime policy, particularly the Freight Forwarder Law of 1961, 75 Stat. 522, which required that independent ocean freight forwarders be licensed and allowed them to receive "brokerage" payments in spe-

cified circumstances. The disputed regulations—General Order 4, Amendment 1, Subpart B (28 Fed. Reg. 4300; 29 Fed. Reg. 5559; 46 C.F.R. 510.20 to 510.27)—were issued pursuant to a general rulemaking proceeding participated in by petitioners and others (FMC Docket 973). The rules provide that a freight forwarder (1) will not be deemed "independent" if it has any "[b]eneficial interest" in a shipment (Section 510.21 (*l*)); (2) cannot collect compensation from a carrier when the carrier itself performs part of the forwarding services (Section 510.22(a)); (3) must itemize on its bill all expenses incurred on the shipper's behalf as well as the forwarder's charges (Section 510.23(j)); and (4) must disclose, upon request, to the Commission or any *bona fide* shipper any special contracts or arrangements it has with other shippers (Section 510.25(a)).[1]

After the Commission had denied petitions for reconsideration of the above regulations, separate petitions for review were filed in the Courts of Appeals for the Second Circuit and the District of Columbia Circuit. All of the cases were consolidated for argument before the Second Circuit under 28 U.S.C. 2112(a). On October 14, 1964, that court affirmed

[1] Petitioners in No. 752 argue that all four regulations are invalid. The petitioner in No. 837 contends only that Section 510.23(j) should be set aside insofar as it requires disclosure of fees charged and premiums paid by a forwarder for insurance.

Sections 510.24 (e) and (g) were also challenged in the court of appeals, but those claims apparently are not being pressed in this Court (but see Pet. No. 752, p. 7, note 3).

the Commission's order (Pet. No. 752, p. 43):

> [T]he six challenged regulations are reasonable and necessary to implement the policy and objectives of the 1916 Shipping Act and the 1961 Freight Forwarder Law. The regulations are not in excess of the authority conferred by both statutes.

ARGUMENT

1. Ocean freight forwarders are employed by shippers or consignees to dispatch their shipments and perform other incidental services. For example, forwarders customarily secure cargo space, prepare shipping documents, and make insurance arrangements (Pet. No. 752, p. 22). While these functions have been generally recognized as valuable, certain activities of the forwarding industry have been investigated and found objectionable. Among the more significant abuses were (1) the so-called "brokerage" payments which the forwarders had, for many years, more-or-less automatically received from ocean carriers regardless of whether such payments were warranted, and (2) the methods employed by forwarders to bill charges to their shipper clients. See, *e.g.*, *Port of New York Freight Forwarder Investigation*, 3 U.S.M.C. 157; *Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders and Related Matters*, 6 F.M.B. 327; *United States* v. *American Union Transport, Inc.*, 327 U.S. 437. See also H. Rep. No. 2939, 84th Cong., 2d Sess., pp. 8, 14, 35; H. Rep. No. 2333, 85th Cong., 2d Sess., p. 13; S. Rep. No. 691, 87th Cong., 1st Sess., pp. 9, 10, 13, 19; H. Rep. No. 1096, 87th Cong., 1st Sess., p. 20.

In the *Port of New York Freight Forwarder Investigation,* 3 U.S.M.C. 157, the Commission found that forwarders had been concealing in their billings markups of varying degrees over and above out-of-pocket expenses incurred for accessorial services such as insurance. In addition, the investigation revealed that many shippers had been collecting "brokerage" from carriers by holding themselves out as forwarders, and that forwarders who had beneficial interests in shipments had been accepting brokerage fees on them. *Id.* at 163–164. The latter practices amounted to rebates in violation of Section 16 of the Shipping Act of 1916, 46 U.S.C. 815, and the Commission's predecessor, the Federal Maritime Board, in 1950 issued regulations, substantially identical to the ones challenged here, to correct the situation. General Order 72, 15 Fed Reg. 3153; *Port of New York Freight Forwarder Investigation, supra,* 3 U.S.M.C. at 165.

Later, the Board, after further investigation, found a continuation of the same abuses and concluded that the 1950 regulations had been "ineffective in preventing rebates." *Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders and Related Matters,* 6 F.M.B. 327, 349–351. It therefore revised and strengthened the regulations generally and, in addition, placed an absolute prohibition on the payment of "brokerage" to forwarders by carriers. *Id.* at 368.

As a result of the Board's total prohibition against brokerage payments from carriers to forwarders, Congress was urged by the forwarders to enact miti-

gating legislation. As a result, Congress passed the Freight Forwarder Law of 1961 which allowed the payment of such brokerage compensation under certain conditions—*e.g.*, when a licensed forwarder actually booked ship space for the cargo, prepared the bill of lading, and paid freight charges (Pet. No. 752, p. 57)—and authorized the Commission to "prescribe reasonable rules and regulations" (Pet. No. 752, p. 56). In favorably reporting the bill which was later passed, the Senate Commerce Committee stated (S. Rep. No. 691, 87th Cong., 1st Sess., p. 7):

> We recognize that malpractices have been widespread in the past, but we are confident that the regulatory authority given the Board in this bill will prevent such practices in the future, and we, therefore, have no hesitancy in recommending that the bill as amended be approved.

Upon passage of the Freight Forwarder Law of 1961, the Commission necessarily revoked the Board's prior regulations and began a new rulemaking proceeding which resulted in the regulations here challenged. In formulating those regulations, the Commission took into account the statutory objectives, the history of the industry's problems, and numerous comments received from interested parties (see Pet. No. 752, pp. 46–53).

2. The petitions present no substantial question warranting further review by this Court. There is no conflict between circuits, and the decision below—which is based on an exhaustive and careful opinion—is correct.

Petitioners' basic contention (Pet. No. 752, pp. 5-6; Pet. No. 837, p. 12) is that all of the regulations are

invalid because "the Commission's rulemaking authority is limited to correcting practices found to violate * * * the 1916 Shipping Act." This argument, as the court of appeals held, takes a too "restrictive view of the agency's powers" (Pet. No. 752, p. 28). Congress specifically gave the Commission authority in Section 2 of the Freight Forwarding Law of 1961, 46 U.S.C. 841b(c), to "prescribe reasonable rules and regulations" without any such restriction. Moreover, a similar contention was rejected by the Court in *American Trucking Assns.* v. *United States*, 344 U.S. 298, 309–310, when it held that it was the "very absence" of Congressional "consideration of every evil sought to be corrected" which made necessary administrative rules to fill in the interstices. Similarly, this Court held in *California* v. *United States*, 320 U.S. 577, 584, that "[f]inding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing."[2]

It is well established that regulations promulgated by administrative agencies, under general rule-making

[2] In *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, on which petitioners rely, the Court held that the Commission's interpretation of the statute it was seeking to enforce was plainly incorrect and therefore its regulations based on that interpretation were invalid. The Court, however, did not suggest, as petitioners imply, that the Commission could not implement the statute by regulating conduct based on a correct interpretation, notwithstanding that the conduct was not specifically barred by the statute. Indeed, the Court suggested the contrary. 347 U.S. at 289, note 7.

authority conferred by Congress, are valid unless they are unreasonable or plainly inconsistent with the statute. See, *e.g.*, *United States* v. *Morehead*, 243 U.S. 607, 614; *United States* v. *Smull*, 236 U.S. 405, 410–411; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203; *United States* v. *Obermeier*, 186 F. 2d 243, 247 (C.A. 2), certiorari denied, 340 U.S. 951; *American Union Transport, Inc.* v. *United States*, 257 F. 2d 607, 612 (C.A. D.C.), certiorari denied, 358 U.S. 828; *Grace Line, Inc.* v. *Federal Maritime Board*, 263 F. 2d 709, 711 (C.A. 2). We show below that each of the four rules challenged in this Court are reasonable and necessary to implement the shipping laws.

a. Rule 519.21(l).—The Freight Forwarder Law of 1961 provides that forwarders must be licensed and that licenses can only be issued to "independent" operators—those having no "beneficial interest" in the shipments they are forwarding (Pet. No. 752, pp. 55–56). This regulation defines the term "beneficial interest" to include "any lien interest" except those arising from payment by the forwarder of out-of-pocket expenses on behalf of the shipper (Pet. No. 752, p. 62). Petitioners in No. 752 object (Pet. 9) to the rule because, in their view, it unreasonably "bar[s] a forwarder from advancing the invoice price of a shipment even though the practice is not *per se* unlawful."

The short answer is that the Commission's rule fully accords with the intent of Congress, as expressed in the Freight Forwarder Law. Legislation proposed by the forwarding industry defined an independent forwarder as one having any "beneficial interest other

than a lien" in a shipment. H. Rep. No. 1096, 87th Cong., 1st Sess., p. 8. But Congress deleted the phrase "other than a lien" from the statute on the ground that "a lien on a shipment could give a freight forwarder sufficient beneficial interest in the shipment to cause payments thereon by the carrier to the forwarder to be a form of indirect rebate of the freight." S. Rep. No. 691, 87th Cong., 1st Sess., p. 4. Similarly, as noted above, a principle purpose of the restrictions on forwarders was to prevent rebates to shippers. The rule is reasonably calculated to prevent forwarders, who in reality own goods in the guise of financing, to use this subterfuge to obtain a discounted freight rate.

b. Rule 510.22(a).—This rule provides that a forwarder cannot collect compensation if, at the forwarder's request, any of the forwarder's services are performed by the carrier or its agent (Pet. No. 752, pp. 62–63). The purpose of the regulation, as expressed by the Commission, was to "prevent forwarders in principal ports who may control cargo moving through outports, from bypassing forwarders in the outports," as had been done by New York forwarders to the detriment of forwarders at other Atlantic ports (Pet. No. 752, pp. 48–49). See *Investigation of Practices, supra,* 6 F.M.B. at 345.

The Freight Forwarding Law specifically provides that the licensing of freight forwarders must be "consistent with the national maritime policies declared in the Merchant Marine Act * * *." 46 U.S.C. 841b(b). That Act in turn provides that it is "the policy of the United States to foster the develop-

ment and encourage the maintenance of * * * a merchant marine." 46 U.S.C. 1101. As the court of appeals held (Pet. No. 752, p. 35):

> We recognize the importance of the ocean freight forwarding industry to the American economy; without the industry's services, our vital export trade would be at a serious disadvantage in the intense competition of world commerce. It is equally important that the forwarding industry flourish at the lesser ports to insure maximum utilization of all shipping routes to our trading associates in all corners of the world.

c. Rule 510.23(j).—This rule requires that forwarders, on their billing forms, itemize their charges and list the actual cost of, among other things, insurance premiums (Pet. No. 752, p. 63). The practice of forwarders had been to bill shippers for the total amount due under one item, covering charges for all services as well as their own actual expenditures on behalf of the shippers. The Commission promulgated the regulation to "prevent freight forwarders from indiscriminately marking up insurance and accessorial services" (Pet. No. 752, p. 49). Since discrimination in charges between shippers for the same service could amount to an unreasonable preference or advantage in violation of Section 16 (First) of the Shipping Act of 1916, 46 U.S.C. 815, this rule is plainly reasonable to prevent this evil.

Petitioners argue (Pet. No. 837, p. 5; see Pet. No. 752, pp. 12–16) that the rule is invalid because, while the Commission "determined that certain forwarders

charged different insurance markups to different shippers," "there was no finding that these shippers were similarly situated" and "that without such a finding, Section 16 First cannot be violated." But, as we have pointed out above (p. 7), the finding of a statutory violation is not a necessary prerequisite to the promulgation of rules.[3] In view of the forwarders' practice of imposing fees for the same service "varying from shipper to shipper and from shipment to shipment" (Pet. No. 752, p. 49), the Commission could properly require disclosure of costs—thus attempting to eliminate unreasonable preferences by bringing the practice to the attention of the shipping public rather than by attacking the practice on a case-by-case basis.

d. Rule 510.25(a).—This regulation requires disclosure to the Commission or to other shippers of any "special arrangement or contract" made with shippers (Pet. No. 752, p. 64). The present regulation is similar to a previous rule which required forwarders to "advise" shippers of the terms of special contracts or agreements made available to other shippers. General Order 72, Section 244.10, 15 Fed. Reg. 3153.

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[3] The court of appeals stated that the "practice of charging shippers disguised markups of widely varying amounts on substantially identically services, without justification, seems to us to be prima facie discriminatory in a regulated industry" (Pet. No. 752, p. 38). Petitioners vigorously argue (Pet. No. 837, pp. 4–9; Pet. No. 752, pp. 12–16) that the Commission erred in finding that the Shipping Act had been violated. This issue, however, need not be reached in this case, since, as the court of appeals further noted (Pet. No. 752, p. 38), the rule is fully justified as a prophylactic measure.

Petitioners in No. 752 argue (Pet. 16) that the present rule requires disclosure of confidential information in violation of Section 20 of the Shipping Act of 1916, 46 U.S.C. 819. Here, as with the immediately preceding rule, the court of appeals correctly found that the established procedure was a "reasonable vehicle for enforcing compliance with Section 16's prohibition against a forwarder 'unduly or unreasonably preferring or discriminating against' any person" (Pet. No. 752, p. 42). The rule does not violate Section 20 which prohibits any forwarder from disclosing "any information concerning the nature, kind, quantity, destination, consignee or routing" of any shipment which may be used to the shipper's detriment or disclose his business transactions to a competitor. The Commission's rule is not directed to any of the information protected by Section 20 since the Commission has defined "special contract" as limited to financial arrangements. 46 C.F.R. 510.21(j) (Pet. No. 752, p. 62).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

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